Supreme Court, U.S.
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No. 95-

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

GLENN TERRILL TREECE,

Petitioner,

v.

FLORIDA PAROLE COMMISSION,

Respondent.

Petition For Writ of Certiorari to the
U.S. Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Whether the State of Florida's two-year limit on filing federal claims for postconviction relief violates the federal due process right to a hearing, the federal Supremacy Clause, and the federal right of access to the courts.

2. Whether the failure by the State of Florida to 'strictly or regularly' apply the two-year filing limit bars the right to the federal writ of habeas corpus.

STATEMENT CONCERNING THE PARTIES

The parties to the habeas corpus proceedings before the U.S. Circuit Court of Appeals, Eleventh Circuit, were Petitioner, GLENN TERRILL TREECE and Respondent, FLORIDA PAROLE COMMISSION.

TABLE OF CONTENTS

Page

Questions presented i

Statement concerning the parties i

Table of contents ii

Table of authorities iii

Opinions below 1

Jurisdiction 1

Constitutional and statutory provisions 1

Statement of the Case 3

Reasons for Granting the Writ 5

As to Question 1 5

As to Question 2 12

Conclusion 15

Appendix

TABLE OF AUTHORITIES

Cases — Page

Atkins v. Singletary 14
622 So. 2d 951 (Fla. 1993)

Bland v. Singletary 15
601 So. 2d 1222 (Fla. Dist. Ct. App. 1992)

Bounds v. Smith 11
430 U.S. 817 (1977)

Boyer v. State 7
562 A.2d 1186 (Del. 1989)

Brazile v. State 14
618 So. 2d 305 (Fla. Dist. Ct. App. 1993)

Breedlove v. Singletary 14
595 So. 2d 8 (Fla. 1992)

Bryan v. Dugger 14
641 So. 2d 61 (Fla. 1994)

Burns v. Ohio 11
360 U.S. 252 (1959)

Case v. Nebraska 5
381 U.S. 335 (1965)

Cash v. Culver 8
122 So. 2d 179 (Fla. 1960)

Chase v. State ex rel. Burch 8
93 Fla. 963, 113 So. 103 (1927)

TABLE OF AUTHORITIES - Continued

Coleman v. Thompson 12
111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)

Cook v. State 13
591 So. 2d 1061 (Fla. Dist. Ct. App. 1991)

Davis v. State 7
443 N.W. 2d 707 (Iowa 1989)

Everett v. Singletary 14
603 So. 2d 117 (Fla. Dist. Ct. App. 1992)

Federal Energy Regulatory Commission v. Mississippi 10
456 U.S. 742 (1982)

Felder v. Casey 10
487 U.S. 131 (1988)

Fletcher v. Armountrout 6
733 F. Supp. 1348 (W.D. Mo. 1989)

Ford v. Georgia 13
498 U.S. 411 (1991)

General Oil Co. v. Crain 9
209 U.S. 211 (1908)

Gideon v. State 8
153 So. 2d 299 (Fla. 1963)

Haag v. State 8
591 So. 2d 614 (Fla. 1992)

TABLE OF AUTHORITIES - Continued

Henderson v. Singletary 14
617 So. 2d 313 (Fla. 1993)

Hickman v. State 7, 13
581 So. 2d 942 (Fla. Dist. Ct. App. 1991)

Higgs v. State 14
601 So. 2d 319 (Fla. Dist. Ct. App. 1992)

Howlett v. Rose 10
496 U.S. 356 (1990)

Jenkins v. State 14
603 So. 2d 641 (Fla. Dist. Ct. App. 1992)

Johnson v. Avery 11
393 U.S. 483 (1969)

Johnson v. Mississippi 12, 15
486 U.S. 578 (1988)

Johnson v. State 7
536 So. 2d 1009 (Fla. 1988)

Keil v. Singletary 14
649 So. 2d 354 (Fla. Dist. Ct. App. 1995)

Kennedy v. Singletary 14
602 So. 2d 1285 (Fla. 1992)

Love v. State 13
623 So. 2d 1221 (Fla. Dist. Ct. App. 1993)

TABLE OF AUTHORITIES - Continued

Marek v. Singletary 14
626 So. 2d 160 (Fla. 1993)

Murray v. Giarrantano 6
492 U.S. 1 (1989)

Nichols v. State 13
571 So. 2d 121 (Fla. Dist. Ct. App. 1990)

Paige v. State 13
645 So. 2d 1107 (Fla. Dist. Ct. App. 1994)

Parker v. State 14
611 So. 2d 1224 (Fla. 1992)

Pennsylvania v. Finley 6
481 U.S. 551 (1987)

People v. Germany 7
674 P.2d 345 (Colo. 1983) (*en banc*),
modified, People v. Fagerholm,
768 P.2d 689 (Colo. 1989)

Phillips v. State 13
608 So. 2d 778 (Fla. 1992)

Porter v. Porter 8
60 Fla. 407, 53 So. 546 (1910)

Remeta v. Dugger 13
622 So. 2d 452 (Fla. 1993)

Richardson v. Miller 6
716 F. Supp. 1246 (W.D. Mo. 1989)

TABLE OF AUTHORITIES - Continued

Richardson v. State 15
624 So. 2d 804 (Fla. Dist. Ct. App. 1993)

Smith v. Bennett 11
365 U.S. 708 (1961)

State v. Bolyea 8
520 So. 2d 562 (Fla. 1988)

State v. District Court of Appeal of Fla., First Dist. 7, 12
569 So. 2d 439 (Fla. 1990)

State v. Fowler 7
156 Ariz. 408, 752 P.2d 497 (1987)

Tafflin v. Levitt 10
493 U.S. 455 (1990)

Testa v. Katt 10
330 U.S. 386 (1946)

Turner v. State 13
570 So. 2d 1114 (Fla. Dist. Ct. App. 1990)

United States ex rel. Caruso v. Zelinsky 7
689 F.2d 435 (3d Cir. 1982)

Wainwright v. Sykes 11
433 U.S. 72 (1977)

Whiddon v. Dugger 11
894 F.2d 1266 (11th Cir.),
cert. denied, 498 U.S. 834 (1990)

TABLE OF AUTHORITIES - Continued

White v. State 6
779 S.W. 2d 571 (Mo. 1989) (*en banc*)

Woolbright v. State 13
606 So. 2d 379 (Fla. Dist. Ct. App. 1992)

Young v. Ragen 5-6
337 U.S. 235 (1949)

Constitutions

Article VI, Section 2 ..... 1, 10
Constitution of the United States

Amendment I, ... 1, 11
Constitution of the United States

Amendment XIV, Section 1 ..... 2, 7, 11
Constitution of the United States

Article I, Section 13 ..... 2, 8
Florida Constitution

Statutes and Court Rules

Title 28 U.S.C. § 1331 3

Title 28 U.S.C. § 1254(1) 1

Title 28 U.S.C. § 2241 3

Title 28 U.S.C. § 2254 12

TABLE OF AUTHORITIES - Continued

Section 79.01 Florida Statutes (1993) 2, 8

Florida Rule of Criminal Procedure 3.800(a) 10

Florida Rule of Criminal Procedure 3.850 ..... 2, 5, 8, 10

Other Authority

Daniel J. Meltzer 12
State Court Forfeiture of Federal Rights
1986 Harv. L. Rev. 1128 (1986)

Donald E. Wilkes, Jr. 5
Federal and State Postconviction Remedies and Relief (1992)

OPINIONS BELOW

The opinion of the U.S. Court of Appeals, Eleventh Circuit, in the underlying cause is set out in Appendix to this petition at A1.

The opinion of the U.S. District Court of Florida, Southern District, in the underlying cause is set out in Appendix to this petition at A3.

The report and recommendation of the U.S. Magistrate Judge in the underlying cause is set out in Appendix to this petition at A5.

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals (A1) was entered on June 12, 1995. This Petition therefore is timely. Rule 13.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, Section 2 Constitution of the United States:

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution of Laws of any State to the Contrary notwithstanding.

Amendment I, Constitution of the United States:

> Congress shall make no law . . . abridging . . . the right to the people . . . to petition the Government for a redress of grievances.

Amendment XIV, Section 1, Constitution of the United States:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law;

Article I, Section 13, Constitution of the State of Florida:

> The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

The following Florida statutes and court rules are reproduced in the Appendix:

> § 79.01, Florida Statutes (1993), A12
> Florida Rule of Criminal Procedure 3.850, A12

STATEMENT OF THE CASE

On December 5, 1990 Appellant filed a petition for a Florida writ of habeas corpus for ineffective assistance of trial counsel to file timely notice of appeal.

On March 7, 1991 the Florida appeals court ordered Appellant to file a 3.850 motion under the then-recent ruling in *State v. District Court of Appeal of Fla., First Dist.*, 569 So. 2d 439 (Fla. 1990). The appeals court simultaneously denied Petitioner's petition for a Florida writ of habeas corpus.

On December 4, 1991 Appellant complied with the state court order and filed the 3.850 motion.

On March 25, 1992 the circuit court rejected the 3.850 motion as time-barred by the two-year limit in Rule 3.850(b). The Florida appeals court upheld this order *per curiam* without written opinion on January 13, 1993.

On December 20, 1993 Appellant filed a petition for writ of habeas corpus in federal district court. Petitioner invoked 28 U.S.C. §§ 1331 and 2241 as the basis for federal jurisdiction in the district court.

On September 27, 1994 the magistrate judge issued a Report and Recommendation recommending the petition be denied. The magistrate judge recommended denial on the basis of (1) procedural default for failure to comply with the two-year filing limit, (A9-A10), and (2) the constitutional attack on the two-year limit was unexhausted. (A10). Appellant filed objections to the Report and Recommendation.

On October 17, 1994 the District Court of Florida, Southern District, summarily affirmed the magistrate's report and dismissed the petition. (A3). On January 11, 1995 the Honorable District Judge King granted Appellant a certificate of probable cause to appeal.

On June 12, 1995 the U.S. Court of Appeal, Eleventh Circuit, summarily denied Petitioner's appeal. (A1).

Petitioner's petition alleged in relevant part:

> On December 11, 1968 Petitioner was adjudicated guilty of robbery by the County Court of Record, in and for Broward County, Case No: 67-24044-X.
>
> On December 20, 1968 Petitioner's attorney moved for an extension of time in which to move for a new trial. The trial judge mistakenly granted the extension. The trial judge also mistakenly instructed Petitioner's attorney that the time to file direct appeal in Florida ran thirty (30) days following any motions for new trial.
>
> The trial court then sentenced Petitioner on December 20, 1968 to ninety-nine years. Petitioner is presently under custody under the supervision of Respondent Florida Parole Commission for that sentence.
>
> On December 30, 1968 Petitioner's attorney moved for a new trial, which motion the trial court did not deny until January 20, 1969.
>
> On January 30, 1969 the trial court declared Petitioner insolvent and appointed Petitioner's former trial counsel as appellate counsel. On January 30, 1969 Petitioner's counsel filed a notice of appeal.
>
> On June 26, 1970 the Florida District Court of Appeals, Fourth District, dismissed Petitioner's direct appeal as untimely based on the January 30, 1969 notice of appeal.
>
> Petitioner never received a direct appeal from his conviction and sentencing.

REASONS FOR GRANTING THE WRIT

1. Question 1 above stated: Whether the State of Florida's two-year limit on filing federal claims for postconviction relief violates the federal due process right to a hearing, the federal Supremacy Clause, and the federal right of access to the courts.

The State of Florida denied Petitioner a post-conviction hearing under both the Florida writ of habeas corpus and Florida Rule of Criminal Procedure 3.850 on fundamental federal rights after unconstitutionally convicting Petitioner in state court.

This Court should grant the Writ to reconcile conflicting state and federal decisions whether state time limits on postconviction relief are constitutional.

The State of Florida and sixteen other states have enacted time limits on filing postconviction relief. Donald E. Wilkes, Jr., *Federal and State Postconviction Remedies and Relief* § 9-2 (1992) (surveying states with time limits on postconviction relief).

This Court has not directly ruled whether a state can deny all hearing on the violation of federal rights caused by a state's prosecutorial system. This Court accepted certiorari review in the 1956 proceeding of *Case v. Nebraska* to determine this issue. *Case v. Nebraska*, 381 U.S. 335 (1965). The petition for certiorari was dismissed, however, after Nebraska hastily enacted a post-conviction review mechanism. *Case*, 381 U.S. at 337.

This Court affirmed in the earlier 1949 case *Young v. Ragen* that some form of postconviction relief was necessary: "[A state] may choose the procedure it deems appropriate for the vindication of federal rights. But it is not simply a question of state procedure when a state court of last resort closes the door to <u>any</u> consideration of a claim of denial of a federal right." *Young v. Ragen*, 337 U.S. 235, 238 (1949) (original emphasis; citation omitted). This Court continued:

"We recognize the difficulties with which the [state] is faced in adapting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. Nevertheless, that requirement must be met." *Young*, 337 U.S. at 239. In more recent cases this Court has indicated *ober dicta* that a state is not required to provide a post-conviction procedure. *E.g., Murray v. Giarrantano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

In 1989 the federal Western District Court of Missouri responded to the State of Missouri's assertion that a federal habeas petition was procedurally barred because it was outside the time limits to file in Missouri state court. The Court made it clear that it was prepared to find that Missouri's denial of post-conviction relief for the alleged federal constitution violations abridged the Fourteenth Amendment:

> The failure of a State to provide any State corrective process calls for a Fourteenth Amendment remedy—a remedy that is an entirely different remedy than that which is to be applied to a State court's failure to construe and apply an available State corrective process, which, on its face, permits meaningful access to the court of a particular State for the hearing and determination of a state prisoner's federal post-conviction claims.

Id. at 1259. The federal district court declined to reach whether Missouri's rule violated the Fourteenth Amendment until the Missouri Attorney General clarified whether habeas relief was still available. *Richardson v. Miller*, 716 F. Supp. 1246, 1260 (W.D. Mo. 1989). In response, the Missouri Supreme Court concluded that habeas relief was available independently from the court rule. *White v. State*, 779 S.W. 2d 571, 573 (Mo. 1989) (*en banc*). The federal cases were dismissed to exhaust the state habeas corpus remedy. *E.g., Fletcher v. Armountrout*, 733 F. Supp. 1348 (W.D. Mo. 1989).

The Colorado Supreme Court also concluded post-conviction time limits on asserting federal rights violates the procedural due process right to be heard. *People v. Germany*, 674 P.2d 345, 354 (Colo. 1983) (*en banc*), *modified, People v. Fagerholm*, 768 P.2d 689 (Colo. 1989).

Conflicting with these decisions, the Florida Supreme Court has upheld its two-year limit against an *ex post facto* challenge. *Johnson v. State*, 536 So. 2d 1009, 1011 (Fla. 1988).

Other state courts and at least one federal court have upheld time limits as constitutional. *E.g., Boyer v. State*, 562 A.2d 1186 (Del. 1989); *Davis v. State*, 443 N.W. 2d 707 (Iowa 1989); *State v. Fowler*, 156 Ariz. 408, 752 P.2d 497 (1987); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3d Cir. 1982).

Fourteenth Amendment Violated

The State of Florida denied Petitioner any post-conviction hearing under both Rule 3.850 and the Florida writ of habeas corpus in violation of the Due Process Clause, Amendment XIV, United States Constitution.

Petitioner applied for a writ of habeas corpus and was rejected by the implementation of a new rule which became final in November 1990. *State v. District Court of Appeal of Fla., First Dist.*, 569 So. 2d 439 (Fla. 1990).

The new rule required Petitioner's claim be brought as a Rule 3.850 motion instead of a petition for Florida writ of habeas corpus. The *First District* ruling changed Florida post-conviction procedure because "[p]rior to 1990 the exclusive method for obtaining belated appellate review was a petition for writ of habeas corpus filed in the appellate court." *Hickman v. State*, 581 So. 2d 942, 942 (Fla. Dist. Ct. App. 1991).

The state court then rejected Petitioner's 3.850 motion, filed thirteen months later in December, 1991, as untimely under the two-year filing deadline. The state court retroactively started the two-year limit against Petitioner on January 1, 1987, the date the two-year limit was finalized. This date is almost four (4) years before the *First District* rule change in November, 1990. This made compliance with *First District* impossible.

Respondent now uses the two-year limit to procedurally bar Petitioner's federal claim. The federal magistrate judge below denied relief on the basis of procedural default. (A9-A10).

The State of Florida may not deny Petitioner all opportunity for hearing in state court. The State of Florida certainly may not deny Petitioner all opportunity for hearing when state law provides such relief through the Florida writ of habeas corpus.

Petitioner is clearly entitled to a hearing under the Florida writ of habeas corpus under the state constitution. *Fla. Const.* art. I, § 13; *Haag v. State*, 591 So. 2d 614, 615 (Fla. 1992); *Chase v. State ex rel. Burch*, 93 Fla. 963, 113 So. 103, 106 (1927). The writ of habeas corpus is also vouchsafed under Florida Statute, *Fla. Stat.* ch. 79.01-79.15 (1993), and Florida common law. *Cash v. Culver*, 122 So. 2d 179, 187 (Fla. 1960); *Porter v. Porter*, 60 Fla. 407, 410, 53 So. 546, 547 (1910).

Rule 3.850 does not preclude the Florida writ of habeas corpus; Rule 3.850(h) expressly provides for "[a]n application for writ of habeas corpus . . . [when] the remedy by motion is inadequate or ineffective to test the legality of the applicant's detention." *Fla. R. Civ. P.* 3.850(g). The Florida Supreme Court has acknowledged that "rule [3.850] was designed to simplify the process of collateral review . . . not to modify the remedy available at common law." *State v. Bolyea*, 520 So. 2d 562, 562 (Fla. 1988); *accord, Gideon v. State*, 153 So. 2d 299, 300 (Fla. 1963) ("The relief available is coextensive with that which would be available in habeas corpus.")

Even if a state is not required to provide for a post-conviction hearing for federal violations occurring in its courts, the state must administer any voluntary post-conviction procedure in accordance with the Constitution. The State of Florida denied Petitioner a post-conviction hearing under the writ of habeas corpus that its constitution, statutes and common law clearly provide. This refusal to administer an available remedy also violates federal due process.

Supremacy Clause Violated

The two-year limit also violates the Supremacy Clause, Article VI, § 2 of the United States Constitution because it selectively bars federal constitutional claims on the adjudicatory process while accepting state challenges to excessive sentences. Florida Rule of Criminal Procedure 3.850(b) expressly permits motions that challenge sentences exceeding the limits provided by law at any time. *See also, Fla. R. Crim. P.* 3.800(a) ("A court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guideline scoresheet.") The two-year limit thereby selectively closes the Florida courts to Appellant's federal constitutional claims.

A state may not close its courts to federal claims when that court otherwise possesses jurisdiction. *Testa v. Katt*, 330 U.S. 386, 392-393 (1946); *General Oil Co. v. Crain*, 209 U.S. 211 (1908). *See also, Howlett v. Rose*, 496 U.S. 356, 369 (1990) ("A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'"); *Tafflin v. Levitt*, 493 U.S. 455, 469-470 (1990) (Scalia concurring) ("the laws of the United States are laws in the several states, and just as much binding on the . . . courts thereof as the State laws are . . ."); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 760-761 (1982) (regarding state agencies: "Any other conclusion [than states must hear federal claims] would allow the States to disregard both the preeminent position held by federal law . . .)

Comity between the state and federal courts runs both ways. Indeed, "[j]ust as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected." *Felder v. Casey*, 487 U.S. 131, 151 (1988) (citations and internal quotation marks omitted).

Right of Access To Courts Violated

Finally, the two-year limit violates Appellant's right to access to the courts under the First and Fourteenth Amendments, United States Constitution.

This Court has unambiguously held: "It is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). This Court has repeatedly invalidated state laws or rules impairing access to the courts, particularly with habeas corpus. *E.g., Johnson v. Avery*, 393 U.S. 483 (1969) (prison regulation forbidding prisoners to assist one another with preparation of legal materials unconstitutional); *Smith v. Bennett*, 365 U.S. 708 (1961) ($4.00 filing fee for habeas unconstitutional for indigent prisoner); *Burns v. Ohio*, 360 U.S. 252 (1959) (clerk of court docketing fee for appeal unconstitutional).

The two-year limit is an outright and permanent bar on access to the courts, both state and federal. Federal statute mandates prior exhaustion of federal habeas claims in the Florida courts. 28 U.S.C. § 2254(b). The two-year limit bars access to the Florida courts. The judicially-created procedural default doctrine then bars the federal claims from federal courts. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Whiddon v. Dugger*, 894 F.2d 1266 (11th Cir.), *cert. denied*, 498 U.S. 834 (1990).

The two-year limit thus allows the State of Florida to control federal rights, and importantly, makes Florida the final arbiter of the relationship between state and federal law.

Comity and federalism are two-way streets. The supremacy of federal law fails if a state controls access to federal courts for federal claims. This Court should grant the Writ to uphold the supremacy of federal law.

2. Question 2 above stated: Whether the failure by the State of Florida to 'strictly or regularly' apply the two-year limit bars the right to the federal writ of habeas corpus.

This Court should grant the Writ to clarify the application of the judicially-created procedural waiver rule to state imposed time limits on postconviction relief.

The federal magistrate judge erroneously concluded Appellant's claim of ineffective assistance of counsel was procedurally barred because it was not filed by January 1, 1987, the last implementation date of the two-year limit in Florida Rule of Criminal Procedure 3.850. (A9-A10).

First, the magistrate judge applied the wrong date. The two-year period should run from the date of the November, 1990 decision *State v. District Court of Appeal of Fla., First Dist.*, 569 So. 2d 439 (Fla. 1990). Petitioner's 3.850 motion was therefore timely and should not have been procedurally barred from federal court.

Second, procedural waiver or default only occurs if the state decision rests on independent and adequate state grounds. *Coleman v. Thompson*, 111 S. Ct. 2546, 2554, 115 L. Ed. 2d 640, 656 (1991). "A state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (citation omitted).

A state procedural ground is inadequate if it (1) is inconsistent with prior state practice, (2) is a novel procedural requirement, (3) is the result of a state court failing to exercise discretion to excuse, or (4) unjustifiably burdens federal rights. *See generally*, Daniel J. Meltzer, *State Court Forfeiture of Federal Rights*, 1986 Harv. L. Rev. 1128, 1138-1145 (1986) (collecting cases). In the present case, the two-year limit is an inadequate state ground for all four reasons.

The new application of the 1990 *First District* ruling does not procedurally waive Appellant's claim: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (citation and quotation marks omitted).

Procedural waiver is also wrong because the Florida courts have not "strictly or regularly" required claims of ineffective appellate counsel to be brought under Rule 3.850, or, adhered to the two-year limit in either 3.850 motions or habeas actions, or, barred Florida habeas relief.

Some Florida appellate courts expressly allow habeas relief for the exact claim brought by Petitioner. *E.g., Love v. State*, 623 So. 2d 1221 (Fla. Dist. Ct. App. 1993) (1st DCA); *Woolbright v. State*, 606 So. 2d 379 (Fla. Dist. Ct. App. 1992) (1st DCA); *Cook v. State*, 591 So. 2d 1061 (Fla. Dist. Ct. App. 1991) (2nd DCA); *Hickman v. State*, 581 So. 2d 942 (Fla. Dist. Ct. App. 1991) (2d DCA).

Other Florida appellate courts do not. *E.g., Turner v. State*, 570 So. 2d 1114 (Fla. Dist. Ct. App. 1990) (5th DCA); *Nichols v. State*, 571 So. 2d 121 (Fla. Dist. Ct. App. 1990) (2d DCA).

One Florida appellate court decision expressly distinguished whether the 3.850 motion was filed within two years of the *First District* decision, and held filing within the two years was timely. *Paige v. State*, 645 So. 2d 1107 (Fla. Dist. Ct. App. 1994) (1st DCA).

This inconsistent treatment itself clearly demonstrates there is no adequate state ground for barring Petitioner's state-level 3.850 motion, and hence, barring Petitioner's federal claims brought under 28 U.S.C. § 2254.

Next, the two-year limit is not an adequate state ground to bar federal habeas relief because (1) the Florida courts inconsistently allow use of the Florida writ of habeas corpus outside the two-year limit, and (2) the Florida courts refused to exercise their discretion to accept Petitioner's petition for writ of Florida habeas corpus which is without time limit.

The Florida Supreme Court routinely reviews habeas petitions filed outside the two-year limit. *E.g., Bryan v. Dugger*, 641 So. 2d 61 (Fla. 1994) (1989 direct appeal; mixed 3.850 motion and habeas petition); *Marek v. Singletary*, 626 So. 2d 160 (Fla. 1993) (second habeas after 1986 direct appeal); *Atkins v. Singletary*, 622 So. 2d 951 (Fla. 1993) (habeas after 1986 direct appeal); *Remeta v. Dugger*, 622 So. 2d 452 (Fla. 1993) (consolidated habeas and 3.850 appeal after 1988 direct appeal); *Henderson v. Singletary*, 617 So. 2d 313 (Fla. 1993) (habeas considered; appealed 3.850 issues time-barred); *Phillips v. State*, 608 So. 2d 778 (Fla. 1992) (consolidated habeas and 3.850 appeal after 1985 direct appeal); *Kennedy v. Singletary*, 602 So. 2d 1285 (Fla. 1992) (habeas after 1985 direct appeal).

During this period the Florida Supreme Court also chose to expressly waive the Rule 3.850 two-year limit to reach an issue. *E.g., Breedlove v. Singletary*, 595 So. 2d 8 (Fla. 1992). The Florida Supreme Court has also decided at least one appeal from 3.850 motion filed outside the two-year limit. *E.g., Parker v. State*, 611 So. 2d 1224 (Fla. 1992) (appeal from 3.850 after 1984 direct appeal).

The intermediate Florida District Courts also still use the Florida writ of habeas corpus in post-conviction matters. *E.g., Keil v. Singletary*, 649 So. 2d 354 (Fla. Dist. Ct. App. 1995) (4th DCA; habeas to receive belated appeal on 3.850 motion); *Brazile v. State*, 618 So. 2d 305 (Fla. Dist. Ct. App. 1993) (1st DCA; habeas to correct court failure to deliver final order); *Higgs v. State*, 601 So. 2d 319 (Fla. Dist. Ct. App. 1992) (5th DCA; habeas to determine when notice of appeal filed); *Jenkins v. State*, 603 So. 2d 641 (Fla. Dist. Ct. App. 1992) (5th DCA; habeas to correct mailing to wrong address); *Everett v.*

Singletary, 603 So. 2d 117 (Fla. Dist. Ct. App. 1992) (4th DCA; habeas to correct lack of certificate of service); *Bland v. Singletary*, 601 So. 2d 1222 (Fla. Dist. Ct. App. 1992) (1st DCA; habeas used to review criminal information). At least one appellate court has also time-barred issues brought under 3.850 but reached issues brought under habeas. *E.g., Richardson v. State*, 624 So. 2d 804 (Fla. Dist. Ct. App. 1993) (1st DCA).

Petitioner's claim has not been procedurally defaulted or waived because the state ground is inadequate to support the new 1990 procedural requirement that ineffective assistance claims be brought as a 3.850 motion rather than as a habeas petition. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988).

CONCLUSION

This Court should issue the Writ for review of the questions presented above.

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INDEX TO APPENDIX

OPINIONS

Decision of the Eleventh Circuit in the underlying appeal A1

Decision of the District Court of Florida, Southern District A3

Report and Recommendation of the Magistrate Judge A5

STATUTES AND COURT RULES

Section 79.01, Florida Statutes (1993) A12

Florida Rule of Criminal Procedure 3.850. ..... A12

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 94-5266
Non-Argument Calendar

D. C. Docket No. 94-6031-CIV-JLK

GLENN TERRELL TREECE,

Petitioner-Appellant,

versus

FLORIDA PAROLE COMMISSION,
Gene R. Hodges, Chairman,
FLORIDA OFFICE OF THE ATTORNEY
GENERAL, Robert A. Butterworth,
Attorney General,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(June 12, 1995)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

We affirm the judgment of the district court denying peitioner-appellant Glenn Terrell Treece habeas corpus relief based upon the well-reasoned report and recommendation of the United States Magistrate judge entered on September 27, 1994.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 94-6031-CIV-KING
Magistrate Bandstra

GLENN TERRELL TREECE,

Petitioner,

v.

GENE R. HODGES, et al.,

Respondents.
_____/

ORDER AFFIRMING MAGISTRATES REPORT AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE comes before the Court on the Magistrate's Report and Recommendation, entered on September 27, 1994. The Clerk has informed the Court that no party has filed an objection to the Magistrate's Report, and the time period for filing objections has lapsed. Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that the Magistrate's Report be, and the same is hereby, AFFIRMED, ADOPTED AND RATIFIED.

For the reasons stated in the Magistrate's Report, it is

FURTHER ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same is hereby, DENIED. The above-styled case be, and the same is hereby, DISMISSED.

DONE AND ORDERED in Chambers at the United States District Courthouse, Federal Justice Building, Miami, Florida, this 17th day of October 1994.

/s/

James Lawrence King
United States District Court
Southern District of Florida

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 94-6031-CIV-KING

GLENN TERRELL TREECE,

Petitioner,

v.

GENE R. HODGES, et al.,

Respondents.

_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court on Petitioner Glenn Terrell Treece's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody filed on January 12, 1994. On January 18, 1994, this matter was referred to United States Magistrate Judge Ted E. Bandstra by the Honorable James Lawrence King for a report and recommendation pursuant to 28 U.S.C. § 636(b). Having carefully considered this petition, the response and reply thereto, the court file and applicable law, the undersigned respectfully recommends that this petition for writ of habeas corpus be DENIED for reasons explained below.

BACKGROUND

On December 11, 1968, Glenn Terrell Treece ("petitioner") was convicted of robbery, following a jury trial in Broward County Circuit Court, Broward County, Florida. On December 20, 1968, defendant was sentenced to a term of ninety-nine (99) years imprisonment for which he is now on parole.

At the time of sentencing, defense counsel moved for an extension of time to file a motion for new trial pursuant to Fla.R.Crim.P. 3.590(a). The trial court granted defense counsel's request, extending the time for filing a motion for new trial until December 30, 1968. However, this ruling was beyond the court's jurisdictional time limit in that such a motion could not be filed beyond fifteen days after rendition of the verdict. See Fla.R.Crim.P. 1.590 (1968).

On December 30, 1968, petitioner, through privately retained counsel, filed a Fla.R.Crim.P. 3.590(a) motion for a new trial. This motion was denied by the trial court on January 29, 1969.

On January 30, 1969, petitioner filed his notice of appeal. On June 26, 1970, the Fourth District Court of Appeals dismissed petitioner's appeal as untimely pursuant to Fla.R.App.P. 140(b)(2), apparently finding that the filing of the motion for new trial did not toll the running of the time period for filing an appeal.

On August 9, 1970, petitioner filed a petition for writ of habeas corpus in the Florida Supreme Court raising claims of ineffective assistance of counsel and insufficient evidence to support a conviction. The Florida Supreme Court denied this petition on October 6, 1970.

Thereafter, petitioner filed a plethora of motions seeking relief from his judgment and sentence including actions filed in this Court, Treece v. Wainwright, Case No. 70-1515-CIV-JE (S.D. Fla. April 20, 1971) (dismissing petition for writ of habeas corpus); in the Fourth District Court of Appeals, Treece v. Wainwright, Case No. 71-213 (March 16, 1971) (dismissing petition for writ of habeas corpus), Treece v. Wainwright, 267 So.2d 116 (Fla. 4th DCA 1972) (dismissing petition for writ of habeas corpus); in the Broward County Circuit Court, Treece v. State, Case No. 67-24044-x (March 1, 1973) (denying Fla.R.Crim.P. 3.850 motion for post-conviction relief), affirmed, Treece v. State, 289 So.2d 69 (Fla. 4th DCA 1974), and again in this Court, Treece v. Wainwright, Case No. 76-6427-CIV-JE (S.D. Fla. January 22, 1977) (dismissing petition for writ of habeas corpus).

Following a lengthy hiatus, petitioner continued to seek relief from his judgment and sentence in action filed in the Fourth District Court of Appeal, Treece v. State, Case No. 90-3267 (Fla. 4th DCA March 7, 1991) (denying petition for writ of habeas corpus which raised essentially the same ineffective assistance of counsel claim as the instant federal petition), and in the Broward County Circuit Court, Treece v. State, Case No. 67-24044-X (March 25, 1992) (denying motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850 which again raised the same ineffective assistance of counsel claim as the instant petition), reh'g denied, November 3, 1992, denial aff'd, Treece v. State, 613 So.2d 43 (Fla. 4th DCA 1993) (essentially rejecting petitioner's second claim herein, i.e., that the two year time limit contained in Fla.R.Crim.P. 3.850 is unconstitutional).

On January 18, 1994, petitioner filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his state conviction and sentence. Specifically, petitioner claims (1) that the was denied effective assistance of counsel in that his attorney failed to timely perfect a direct appeal on his behalf; and (2) that the two year time limit contained in Fla.R.Crim.P. 3.850 is unconstitutional.

Following this Court's issuance of an Order to Show Cause, Respondents Gene R. Hodges, Chairman of the Florida Parole & Probation Commission; Robert A. Butterworth, Attorney General of Florida; and Harry K. Singletary, Secretary of the Department of Corrections (hereinafter "the State"), filed their response on June 15, 1994, opposing the instant petition on the ground of procedural default.

On September 9, 1994, petitioner filed his reply memorandum.

CONCLUSIONS OF LAW

1. Ineffective Assistance of Counsel

Petitioner moves for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the ground he was denied effective assistance of counsel in that his attorney failed to timely perfect a direct appeal on his behalf. Specifically, petitioner argues and the record reflects that, at the request of petitioner's privately retained counsel, the state trial court erroneously extended the time for petitioner to file his motion for a new trial beyond the State's jurisdictional time limit thereby rendering the motion a nullity. See Miller v. State, 134 So.2d 513 (1st DCA Fla 1961). As a result, the motion for new trial, which was denied, did not toll the time period for filing a notice of appeal so that the thirty day period to appeal began to run from the date of sentencing (December 20, 1968). On January 30, 1969, petitioner, through counsel, filed his notice of appeal which was dismissed as untimely. See Fla.R.App.P. 9.140(b)(2).

As outlined above, petitioner thereafter sought relief in the trial court, the Florida Fourth District Court of Appeal, the Florida Supreme Court, and this Court through the filing of Fla.R.Crim.P. 3.850 motions and habeas corpus petitions alleging ineffective assistance of counsel in failing to timely perfect a direct appeal. Petitioner's requested relief was consistently denied on the basis that the failure to timely perfect an appeal was attributable to petitioner's privately retained counsel and, thus, did not present a federal constitutional question.

Recognizing that this issue has been previously litigated, petitioner nevertheless argues that these dispositions do not preclude review of the instant petition in light of the subsequent decision of Evitts v. Lucey, 469 U.S. 387 (1985), which held that a defendant has a constitutional right to effective assistance on appeal by a privately retained attorney. Id. at 396-97. Arguing that the Evitts decision marks a change in the law which was not available prior to 1985

and thus should be applied retroactively, petitioner contends that the instant petition is not an abuse of the writ and should be addressed on the merits.[1]

The State responds by arguing that federal review of petitioner's claim that he is entitled to a belated appeal based on ineffective assistance of counsel is foreclosed by the state courts' previous denial of this claim on ground of procedural default. The State's argument is premised upon the well established principle that a federal court will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on state law that is both independent of the merits of the federal claim and an adequate basis for the court's decision. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977). State [sic] otherwise, a state procedural default bars consideration of an issue on federal habeas review when (1) the last state court rendering a judgment on the issue in question "clearly and expressly" states that its judgment rests on a procedural bar. Harris v. Reed, 489 U.S. 255 (1989); or (2) there is clear and unambiguous application of a bar by the trial court, followed by a per curiam affirmance on appeal YLST v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 2594 (1991); Harmon v. Barton, 894 F.2d 1268 (11th Cir. 1990). Under these circumstances, the applicable state rule bars federal relief unless the petitioner is able to show both cause for the default and prejudice resulting therefrom. Id.

In this case, the undersigned finds that petitioner's claim that he is entitled to a belated appeal because of ineffective assistance of counsel is procedurally barred from federal review because the trial court clearly applied the bar when considering petitioner's most recent Rule 3.850 motion which also relied on Evitts v. Lucey as a basis for relitigation of this claim. Specifically, the trial court denied petitioner's motion as time barred "for the reasons state in the State's Response thereto", attaching a copy of that response to its decision. See Treece v. State, Case No. 67-24044-X (Brow. Co. Cir. Ct. Order

[1]As discussed below, this identical argument was previously rejected by the Florida's Fourth District Court of Appeal in Treece v. State, Case No. 90-3267 (1991).

dated March 25, 1992). Those reason included petitioner's failure to comply with the two filing limitation specified in Rule 3.850.[2] Petitioner's contention that his claim fell within one of the two exceptions [in Rule 3.850] (i.e., the establishment of a new fundamental constitutional right) to the application of the time limit was rejected since the right was established prior to January 1, 1985 in State v. Meyer, 430 So.2d 440 (Fla. 1983)[3] so that petitioner had only until January 1, 1987 to file his motion in accordance with that rule. The trial court's decision was affirmed, per curiam, by the Florida's Fourth District Court of Appeal on January 13, 1993.

In addition, the undersigned finds that petitioner has failed to establish cause for his failure to file his 3.850 motion prior to January 1, 1987. Accordingly, petitioner has failed to overcome the procedural bar of Wainwright v. Sykes, supra, thereby foreclosing this claim from federal review.

2. Constitutionality of the two year limit contained in Fla.R.Crim.P. 3.850

Perhaps recognizing that his ineffective assistance of counsel claim would be barred from federal review in light of the two year limitation set forth in Fla.R.Crim.P. 3.850, petitioner also argues that this limitation is unconstitutional as violative of the Supremacy Clause and the First and Fourteenth Amendments of the U.S. Constitution. Petitioner has previously raised this identical claim before the Florida's Fourth District Court of Appeal. See Treece v. State, 613 So.2d 43 (Fla. 4th DCA 1993).

Reviewing this claim, the undersigned first finds that this claim is unexhausted because it was not presented to the trial court in petitioner's most recent Rule 3.850 motion (discussed above), but rather was raised for the first time in the Court of Appeal on the denial of that motion. When a claim has not been exhausted in the

[2][quoting selected text of Florida Rule of Criminal Procedure 3.850].
[3]In State v. Meyer, the Florida Supreme Court held that the right to effective assistance of counsel encompasses court appointed as well as privately retained counsel.

state courts but would be barred if it were presented there, a federal court may rely upon the applicable state rule and bar the claim because exhaustion would be futile, unless the petitioner can show cause and prejudice or that fundamental miscarriage of justice would occur. Gordon v. Nagle, 2 F.3d 385 (11th Cir. 1993); Collier v. Jones, 910 F.2d 770, 773 (11th Cir. 1990).

In this case, petitioner's claim that the two year time limit specified in Rule 3.850 is unconstitutional would be procedurally barred if presented to the state court. See Doyle v. State, 526 So.2d 909 (Fla. 1988) (claims which could have been raised on direct appeal or in a motion to vacate judgment and sentence are procedurally barred and cannot be raised for the first time on appeal of denial of such motion); see also Scott v. State, 629 So.2d 888 (Fla 4th DCA 1993). Again, the undersigned notes that this claim was not raised in petitioner's Rule 3.850 motion filed with the trial court and thus not properly raised on appeal. Moreover, petitioner has failed to show cause why this issue was not raised before the trial court.

Accordingly, the undersigned finds that this claim is also precluded from federal rule under the doctrines of exhaustion and procedural bar.

SUMMARY

In summary, the undersigned recommends that this petition for writ of habeas corpus be DENIED as procedurally barred.

* * * * *

RESPECTFULLY SUBMITTED in Miami, Florida, this 27th day of September, 1994.

/s/

TED E. BANDSTRA
UNITED STATES MAGISTRATE JUDGE

Section 79.01
Florida Statutes (1993)

79.01 Application and writ.—When any person detained in custody, whether charged with a criminal offense or not, applies to the Supreme Court or any justice thereof, or to any district court of appeal or any judge thereof or to any circuit judge for a writ of habeas corpus and shows by affidavit or evidence probable cause to believe that he is detained without lawful authority, the court, justice or judge to whom such application is made shall grant the writ forthwith, against the person in whose custody the applicant is detained and returnable immediately before any of the courts, justices or judges as the writ directs.

Florida Rule of Criminal Procedure 3.850

RULE 3.850 MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

(a) Grounds for Motion. A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released on the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida, that the court was without jurisdiction to enter the judgment or to impose the sentence, that the sentence was in excess of the maximum authorized by law, that the pleas was given involuntarily, or that the judgment or sentence is otherwise subject to collateral attack may move, in the court that entered the judgment or imposed the sentence, to vacate, set aside, or correct the judgment or sentence.

(b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or,

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

* * * *

(h) Habeas Corpus. An application for writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule shall not be entertained if it appear that the applicant has failed to apply for relief, by motion, to the court that sentenced the applicant or that the court has denied the applicant relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of the applicant's detention.